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PRELIMINARY OVERVIEW OF THE STANDARD OF JUDICIAL REVIEW OF OSHA STANDARDS

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I. SUBSTANTIAL EVIDENCE TEST GOVERNS JUDICIAL REVIEW OF OSHA STANDARDS

The Occupational Safety and Health Act (the Act) empowers the secretary of labor (the secretary) to, among other things, promulgate standards regulating occupational safety and health (OSHA standards).¹ The secretary has delegated the authority to promulgate OSHA standards to the assistant secretary for occupational safety and health, the head of the Occupational Safety and Health Administration (OSHA).²

The United States courts of appeals have exclusive jurisdiction of all challenges to the validity of OSHA standards.³ The reviewing court must uphold a standard if the secretary's determinations in promulgating it are "supported by substantial evidence in the record considered as a whole."⁴ The court may only "scrutinize the record to ensure that the secretary has made his findings of fact on the basis of substantial evidence and has provided a reasoned explanation for his policy assumptions and conclusions."⁵ Substantial evidence, generally speaking, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁶

The court affords substantial deference to OSHA's determinations in applying the substantial evidence test. The standard of judicial review is not as stringent as the preponderance of evidence test, but is more stringent than the arbitrary and capricious standard applicable to federal agencies governed by the Administrative Procedures Act.⁷ If the evidence permits two inconsistent conclusions, the court must review the evidence on both sides but will uphold OSHA's determinations if they are supported by substantial evidence.⁸ OSHA has the burden of persuading the reviewing court that it is more likely than not that the standard at issue is valid according to the substantive requirements outlined in the next section of this document.⁹

The courts' task in reviewing OSHA's determinations under 29 U.S.C. § 655(f) is "to ensure public accountability" by requiring that OSHA support its standard in the following four ways: (i) identify relevant factual evidence; (ii) explain the logic and policies underlying any legislative choice; (iii) state candidly any assumptions on which it relies; and (iv) present its reasons for rejecting significant contrary evidence and argument.¹⁰ Ultimately, the reviewing court must ensure that OSHA (i) acted within the scope of its authority, (ii) followed the procedures required by statute and by its own regulations, (iii) explained the bases for its decision, and (iv) adduced substantial evidence in the record to support its determinations.¹¹

Reversing the court of appeals' judgment is difficult. First, an appeal to the U.S. Supreme Court must clear the initial hurdle of certiorari. Second, the Supreme Court must sustain the court of appeals unless it "misapprehended or grossly misapplied" the substantial evidence standard, which "ought to be the rare instance."¹²

II. RISK AND FEASIBILITY ARE THE PRIMARY ISSUES IN JUDICIAL REVIEW OF OSHA STANDARDS

Judicial review of permanent OSHA standards regulating exposure to toxic materials or harmful physical agents revolves primarily around two issues: risk and feasibility. The issue of risk originates in 29 U.S.C. § 652(8), which requires that OSHA standards be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The issue of feasibility arises from 29 U.S.C. § 655(b)(5), which requires the secretary, in issuing standards dealing with toxic materials or harmful physical agents, to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."

If challenged, OSHA must demonstrate that its determinations with respect to both risk and feasibility were supported by substantial evidence. The analysis is typically whether substantial evidence supports the secretary's determinations that:

1. an alleged toxic material, at currently permissible exposure levels, presents a significant risk to workers' health;
2. the standard at issue would significantly reduce that risk;
3. the standard at issue is technologically feasible; and
4. the standard at issue is economically feasible.

A. Significant Risk of Harm is a Condition Precedent to Promulgation of OSHA Standards.

"Congress intended, at a bare minimum, that the Secretary find a significant risk of harm and therefore a probability of significant benefits before establishing a new standard."¹³ *Benzene* is a plurality opinion, but its significant risk requirement has been endorsed by a majority of the Supreme Court in *Cotton Dust* and accepted by the circuit courts of appeals.¹⁴ OSHA bears the burden of establishing significant risk of material health impairment and the need for the proposed standard.¹⁵ If OSHA does not meet this burden, its standard will not be upheld.¹⁶ The Eleventh Circuit in *AFL-CIO v. OSHA* upheld OSHA's finding that non-lethal health effects, such as severe irritation, can constitute material impairments of health warranting OSHA regulation.¹⁷

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1. Quantifying significant risk of material health impairment is elusive.

In *Benzene*, the plurality did not specify the numbers required for a risk of material health impairment to be significant, warning that the inquiry should not be a "mathematical straightjacket," but did state that "if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it."¹⁸ Citing *Benzene*, the Ninth Circuit stated that OSHA "can be reasonable in determining that a one in a thousand risk is significant,"¹⁹ and OSHA reportedly uses the rule of thumb that a risk of harm is significant if it is greater than one in 1,000.²⁰

2. Significant risk test allows for substantial deference.

In *Benzene*, the Court said that OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty," because OSHA findings are often made "on the frontiers of scientific knowledge."²¹ "[R]equiring strict proof would fatally cripple all of OSHA's regulatory efforts and run counter to the legislative branch's express delegation of hybrid rulemaking power to OSHA."²²

With respect to suspected carcinogens, OSHA may use conservative assumptions in interpreting the data it receives, risking error on the side of overprotection rather than under-protection, so long as the assumptions are supported by a body of reputable scientific thought.²³ Since *Benzene*, courts have used this language in support of OSHA's findings that occupational exposure to arsenic and ethylene oxide present significant risks of harm.²⁴ However, the court in *AFL-CIO v. OSHA* stated that "*Benzene* does not provide support for setting standards below the level substantiated by the evidence," and a finding of significant risk at lower levels of exposure cannot be based on "unsupported assumptions using evidence of health impairments at significantly higher levels of exposure."²⁵

3. Cases have allowed OSHA to extrapolate from animals to humans and from one material to another.

Epidemiological data combined with studies of animal experiments can provide sufficient substantial evidence for a conclusion by OSHA that a particular substance "causes cancer in laboratory animals and poses a significant cancer risk for humans."²⁶ The court noted with approval that OSHA's regulations allow it "to infer a carcinogenic hazard from one or more positive human or animal studies."²⁷ OSHA also may extrapolate results from studies of one material to assess the risk of a different, related material.²⁸

Significantly, *Ethylene Oxide* reached its conclusion even though the court acknowledged shortcomings in individual studies.²⁹ "The mere fact that [a] study is challenged by some, or even a mathematical majority, of commentators, does not render it scientifically or legally useless."³⁰

B. OSHA Standards Must Be Feasible (Capable of Being Done) Both Technologically and Economically.

As stated above, § 655(b)(5) requires that an OSHA standard regulating exposure to toxic materials or harmful physical agents protect workers "to the extent feasible." Feasible means "capable of being done."³¹ An OSHA standard must be both technologically and economically feasible. As is the case with proof of a substantial risk of harm, OSHA need not prove either technological or economic feasibility with certainty, but is required (i) to use the best available evidence and the latest available scientific data and (ii) to support its conclusions with substantial evidence.³²

1. A standard is technologically feasible if engineering controls and workplace practices can be achieved.

To establish technological feasibility, OSHA must present substantial evidence of a reasonable possibility that a typical firm affected by a standard can develop and install engineering and work practice controls that can meet the standard in most of the firm's operations most of the time.³³ A "reasonable possibility" is established when OSHA is able to point to "technology that is either already in use or has been conceived and is reasonably capable of experimental refinement and distribution within the standard's deadlines."³⁴ OSHA can require an industry to meet standards never attained anywhere, provided it presents substantial evidence that "companies acting vigorously and in good faith *can develop* the technology."³⁵ Similarly, even if only the most technologically advanced plants in an industry have been able to achieve the standard in only some of their operations some of the time, the standard may be considered feasible for the entire industry.³⁶

If OSHA makes reasonable predictions based on credible sources of information, a reviewing court should defer to OSHA's feasibility determinations.³⁷ Any risk that the standard may prove to be infeasible in practice is neutralized by the ability of firms to raise feasibility issues in enforcement proceedings.³⁸ Nevertheless, the test for technological feasibility "cannot be lamely deferential."³⁹

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2. A standard is economically feasible provided it would not imperil the existence or threaten the competitive structure of industries affected by the standard.

A standard is economically feasible if the costs it imposes can be passed on or absorbed without imperiling the existence or threatening the competitive structure of the industries affected by the standard.⁴⁰ A standard may be economically feasible "even if it does portend disaster for some marginal firms."⁴¹ To demonstrate economic feasibility, OSHA must submit substantial evidence that it reasonably estimated the range of probable costs of industry compliance and compared those costs to the industry's financial profile "to determine the likely effect of the costs on the prices of the industry's product (if the costs were able to be passed through to consumers) or on the viability of the industry (if the costs had to be absorbed)."⁴² OSHA is not required "to write an economic treatise."⁴³

The Act does not require OSHA to compare the costs and benefits of a standard regulating exposure to toxic materials and harmful physical agents.⁴⁴ In § 655(b)(5), "Congress itself defined the basic relationship between costs and benefits, by placing the benefit of worker health above all other considerations save those making attainment of this benefit unachievable."⁴⁵ However, Executive Order No. 12866 requires federal agencies to, among other things, conduct an assessment of the potential costs and benefits for any rules having a potentially significant economic impact on the national economy, individual industries, geographic regions, or levels of government.⁴⁶ Further, the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, requires that OSHA consider the impact of proposed regulations on small entities. It also requires that agencies consider alternatives which will alleviate any small entity impacts identified by the analysis.

III. CONCLUSION

Doubts are inevitable when parties are litigating about matters "on the frontiers of scientific knowledge." In the case of pre-enforcement review of occupational safety and health standards, the benefit of most of those doubts will be given to OSHA, even though it bears the burden of persuading a reviewing court that its standards are valid.

TABLE OF AUTHORITIES

1. 29 U.S.C. § 655(a)-(c).
2. 29 C.F.R. § 1910.4.
3. 29 U.S.C. § 655(f).
4. *Id.*
5. *American Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 982 (D.C. Cir. 1991) (single quotation marks and citations omitted).
6. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 522-23, (1981) [hereinafter *Cotton Dust*], quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, (1951).
7. See *Color Pigments Mfrs. Ass'n. v. OSHA*, 16 F.3d 1157, 1160 (11th Cir. 1994).
8. *Cotton Dust*, 452 U.S. at 523; see also *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1263 (D.C. Cir. 1980) [hereinafter *Lead I*] ("[T]he court must not second-guess the particular way the agency chooses to weigh the conflicting evidence or resolve the dispute."), cert. denied, 453 U.S. 913 (1981).
9. See *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 653 (1980) [hereinafter *Benzene*] (plurality opinion).
10. *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1485 (D.C. Cir. 1986) [hereinafter *Ethylene Oxide*]; *Lead I*, 647 F.2d at 1207.
11. *Lead I*, 647 F.2d at 1206.
12. *Cotton Dust*, 452 U.S. at 523 (citations and internal quotation marks omitted).
13. *Benzene*, 448 U.S. at 644.
14. See *Cotton Dust*, 452 U.S. at 505, n.25; *Asarco, Inc. v. OSHA*, 746 F.2d 483, 490 (9th Cir. 1984) [hereinafter *Arsenic*]; *Lead I*, 647 F.2d at 1246.
15. 448 U.S. at 653.
16. *Id.* at 662; see also *AFL-CIO v. OSHA*, 965 F.2d 962, 986-87 (11th Cir. 1992).
17. 965 F.2d at 975.

18. 448 U.S. at 655.
19. *Arsenic*, 746 F.2d at 491
20. W. Ford, Digest on H.R. 3160, "Comprehensive Occupational Safety and Health Reform Act," introduced August 1, 1991.
21. 448 U.S. at 655-56 (internal quotation marks omitted).
22. *Ethylene Oxide*, 796 F.2d at 1499.
23. *Benzene*, 448 U.S. at 656.
24. See *Ethylene Oxide*, 796 F.2d 1499; *Arsenic*, 746 F.2d at 495.
25. 965 F.2d at 979.
26. *Ethylene Oxide*, 796 F.2d 1486-89, 1496-97.
27. *Id.* at 1498, citing 29 C.F.R. § 1990.143.
28. *Arsenic*, 746 F.2d at 494-95, citing *Environmental Defense Fund v. EPA*, 598 F.2d 62, 83-85 (D.C. Cir. 1978).
29. 796 F.2d at 1489, 1503.
30. *Id.* at 1494.
31. *Cotton Dust*, 452 U.S. at 508-09; *Arsenic*, 746 F.2d at 495.
32. 29 U.S.C. § 655(b)(5); *American Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 982 (D.C. Cir. 1991) [hereinafter *Lead II*].
33. *Arsenic*, 746 F.2d at 498; *Lead I*, 647 F.2d at 1269-70, 1272.
34. *Lead I*, 647 F.2d at 1272.
35. *Arsenic*, 746 F.2d at 495 (emphasis in original) (internal quotation marks and citations omitted).
36. *Lead I*, 647 F.2d at 1264; see *Lead II*, 939 F.2d at 985.
37. *Lead I*, 647 F.2d at 1265.

38. *Id.* at 1266; *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988).
39. *Lead I*, 647 F.2d at 1273.
40. *Lead II*, 939 F.2d at 982; *Lead I*, 647 F.2d at 1265, 1272.
41. *Lead I*, 647 F.2d at 1272.
42. *Lead II*, 939 F.2d at 982.
43. *Arsenic*, 746 F.2d at 501.
44. *Cotton Dust*, 452 U.S. at 509.
45. *Id.*
46. 3 C.F.R. 638 (1994).